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No. 01-1730

Supreme Court, U.S.
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In The
Supreme Court of the United States

FRANK SINATRA, JR.,

Petitioner,

vs.

BARRY KEENAN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a convicted felon's First Amendment right to freedom of speech is violated by California Civil Code section 2225(b)(1), which provides for payment to injured victims of proceeds owing to a convicted felon for the depiction, portrayal, or reenactment of his crime.

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INTEREST OF AMICUS CURIAE STATE OF CALIFORNIA

The State of California respectfully files this brief in support of petitioner, pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States.

California, like the federal government and over 30 States,[1] has enacted a criminal anti-profit statute. These statutes are commonly called "Son of Sam" laws, named after New York's statute that attempted to prevent serial killer David Berkowitz (also known as Son of Sam) and others from profiting by telling tales of their crimes. This case involves the constitutionality of a portion of California's Son of Sam law, California Civil Code section 2225.[2] That portion, section 2225(b)(1), has been in effect since the California law was first enacted in 1983.[3]

In 1991, this Court held that New York's Son of Sam law violated the First Amendment. *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 502 U.S. 105 (1991). California's Son of Sam law does not have the infirmities

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[1] See, e.g., the federal "Son of Sam" law, entitled the Victims of Crime Act of 1984, 18 U.S.C. §§ 3681-82 (1994); Ala. Code §§ 41-9-80 to -84 (1991); Alaska Stat. § 12.61.020 (1990); Ariz. Rev. Stat. Ann. §§ 13-4201 to -4202 (1989 & Supp. 1994); Colo. Rev. Stat. §§ 24-4.1-201 to -207 (1990 & Supp. 1994); Del. Code Ann. tit. 11, §§ 9101-06 (1987 & Supp. 1994); Neb. Rev. Stat. §§ 81-1835 to -1842 (1994); Ohio Rev. Code Ann. §§ 2969.01-.06 (Baldwin 1994); S.D. Codified Laws Ann. §§ 23A-28A-1 to -14 (1988 & Supp. 1995); Tenn. Code Ann. §§ 29-13-401 to -411 (Supp. 1994).

[2] The statute is set forth in the Petition for Writ of Certiorari, page 2, n. 1. Unless otherwise noted, all statutory references are to the California Civil Code.

[3] The law was first codified as section 2224.1. In 1986, it was renumbered as section 2225.

noted in *Simon & Schuster*. It is narrowly tailored to advance compelling interests of the State: (1) depriving convicted felons of fruits of their crimes, (2) compensating victims who have sustained injuries from the crimes for which the felon was convicted, and (3) providing restitution to all victims. Nevertheless, the California Supreme Court found otherwise, stating that *Simon & Schuster* "governs this case." *Keenan v. Superior Court*, 40 P.3d 718, 725 (Cal. 2002).

Justice Blackmun, in his concurring opinion in *Simon & Schuster*, noted that "[m]ost other States have similar [Son of Sam] legislation and deserve from this Court all the guidance it can render in this very sensitive area." *Simon & Schuster*, 502 U.S. at 124 (Blackmun, J., concurring). The State of California urges the Court to grant the petition for writ of certiorari, not only to correct the California Supreme Court's misinterpretation of *Simon & Schuster*, but also to clarify the law in this "very sensitive area" for Congress and the various state legislatures.

STATEMENT OF THE CASE

Amicus State of California adopts petitioner's statement of the case.

SUMMARY OF ARGUMENT

California Civil Code section 2225(b)(1) is constitutional because it is narrowly drawn to further compelling state interests. The California law thus dramatically

differs from the New York Son of Sam law, which this Court found unconstitutional in *Simon & Schuster.*

Before the California statute may be applied, there must be a convicted felon who has sold his or her story. That story must be a depiction, portrayal or reenactment of the felony for which the felon was convicted and it must be more than a passing mention of the crime. In addition, the victim-beneficiary must have sustained injury or damage proximately caused by the felon's crime.

Therefore, significantly fewer literary works are subject to the California statute than the New York Son of Sam law.

ARGUMENT

CALIFORNIA CIVIL CODE SECTION 2225(b)(1) CONFORMS WITH CONSTITUTIONAL STANDARDS, IS NARROWER THAN ITS NEW YORK COUNTERPART, AND IS NOT OVERINCLUSIVE

Under certain circumstances, government may restrict the exercise of rights under the First Amendment. However, as this Court has observed, "[T]he State must show that its regulation is *necessary to serve a compelling state interest and is narrowly drawn to achieve that end.*" *Simon & Schuster,* 502 U.S. at 118 (italics added) (citation omitted). As set forth below, there are compelling state interests for section 2225(b)(1). Moreover, the statute at issue is narrowly drawn to achieve those ends.

A. Compelling State Interests Underlie The Statute At Issue

This Court has recognized that there is a compelling state interest both in "ensuring that victims of crime are compensated by those who harm them," *Simon & Schuster,* 502 U.S. at 118, and in "ensuring that criminals do not profit from their crimes." *Id.* at 119. Section 2225(b)(1) furthers both of these legitimate interests by depriving convicted felons of the profits of their crimes when those crimes proximately cause physical, mental, or emotional injury, or pecuniary loss to the victims, and by redirecting those profits to the compensation of the victims who have sustained injuries from the crimes.

So important is California's interest in compensating victims of violent crimes, that the voters of California have codified that interest in their Constitution as part of the "Victims' Bill of Rights":

> It is the unequivocal intention of the People of the State of California that all persons *who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.*

Cal. Const. art. I, § 28(b) (italics added).

The commitment of the State of California to restitution is further evidenced by the State's Victims of Crimes statute:

> It is in the *public interest* to assist residents of the State of California *in obtaining restitution* for

> the pecuniary losses they *suffer as a direct result of criminal acts.*

Cal. Gov. Code § 13959 (italics added).[4]

Section 2225(b)(1) provides that proceeds from the sale of the felon's story are placed in a five-year involuntary trust. If the proceeds are unclaimed after that five-year period, the proceeds must be allocated to the Restitution Fund to pay claims filed by victims of crime. § 2225(b)(1).

There can be little doubt, therefore, that section 2225(b)(1) serves California's compelling interests.

B. Section 2225(b)(1) Is Narrowly Drawn To Further Those Compelling State Interests

The Court in *Simon & Schuster* found the New York Son of Sam law to be significantly overinclusive due to two provisions. First, the statute applied to works on *any subject*, if they expressed the author's thoughts or recollections about his crime, *no matter how tangentially or incidentally*. Second, persons who admitted to committing a crime, even if never convicted, were subject to the statute. Combined, those two provisions encompassed a potentially large number of works within the statute. *Simon & Schuster*, 502 U.S. at 121.

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[4] Having the felon provide restitution to his or her victim is a compelling state interest. Equally compelling is providing restitution for all victims of crimes. Thus, in situations where the felon is unknown or where the felon has inadequate resources to compensate the victim, the Victims of Crimes statute provides for a Restitution Fund against which all victims of crimes may petition to recover economic losses. Cal. Gov. Code §§ 13959-13969.2.

To dramatize how overinclusive the statute was, the Court listed numerous literary works and examples of works – many by authors who had committed minor or meaningless crimes, crimes of conscience or protest, and victimless crimes, or whose crime victims had sustained no real injury – that would fall within the scope of the New York statute. The Court included *The Autobiography of Malcolm X* (description of crimes before he became a public figure); *Civil Disobedience* (where Thoreau admits his refusal to pay taxes); and *Confessions of Saint Augustine* (a description of stealing pears from a neighbor). Also listed were examples of prominent figures whose autobiographies would be subject to the statute, including Jesse Jackson (arrested for trespass and resisting arrest after attempting to be served at a lunch counter) and Bertrand Russell (arrested for protesting against nuclear weapons).

To further emphasize the overinclusiveness of the New York Son of Sam statute, the Court posed the following hypothetical:

> Should a prominent figure write his autobiography . . . and include in an early chapter a brief recollection of having *stolen . . . a nearly worthless item* as a youthful prank, the Board would control his entire income from the book for five years, and would *make that income available to all of the author's creditors*, despite the fact that the statute of limitations for this minor incident had long since run. *That the Son of Sam law can produce such an outcome indicates that the statute is . . . not narrowly tailored to achieve the*

> *State's objective of compensating crime victims from the profits of crime.*

Simon & Schuster, 502 U.S. at 123 (italics added).[5]

California's statute does not suffer from these defects. California's statute risks application to far fewer literary works because the statute is much narrower in scope in three respects. First, unlike the sweeping New York statute, section 2225 is limited only to persons convicted of a felony, or found "not guilty by reason of insanity." Cal. Civ. Code § 2225(a)(1).[6] Second, whereas the New York statute applied to works on "any subject" if they expressed the author's "thoughts, feelings, opinions, or emotions regarding such crime, however tangentially or incidentally," the California statute applies only to a "depiction, portrayal, or reenactment of a felony"; a "passing mention of the felony, as in a footnote or bibliography" is excluded from application of the statute. Cal. Civ. Code § 2225(a)(7). Third, unlike New York, where any mention of the crime triggered the statute, a more detailed description of the events or a performance of the felony is necessary before California's section 2225(b)(1) is applicable.

A review of the examples given in *Simon & Schuster* is useful to see how much more narrowly drawn section 2225(b)(1) is than its New York counterpart. None of those examples are subject to section 2225(b)(1). Minor and meaningless crimes are not subject to the California Son of Sam

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[5] The Court's hypothetical demonstrates that, not only was New York's law overinclusive, but it would not necessarily even serve its purpose: compensation of *victims*, not *creditors*.

[6] Indeed, New York's Son of Sam law did not even require a conviction of a crime.

law because the criminal must have committed a felony. Civ. Code § 2225(a)(1). Literary works where a victim has sustained no injury or damages from the felony are not subject to section 2225. The beneficiary must have sustained "physical, mental, or emotional injury, or pecuniary loss, proximately caused" by the crime for which the felon was convicted. Civ. Code § 2225(a)(4)(A).

Not only is the California statute narrower in its scope, but the California statute does serve the compelling purposes for which it was enacted. In contrast to the New York statute, the money in the involuntary trust under California's statute is not available for general creditors of the convicted felon. At least 60 percent of the money placed in the involuntary trust must be placed in reserve for the beneficiary. The remainder may go either to California's Restitution Fund to provide restitution to all victims of crimes,[7] or to cover costs for the felon's criminal defense or defense of a cause of action brought under section 2225. Civ. Code § 2225(d).

California's Civil Code section 2225(b)(1) is, therefore, narrowly drawn to achieve its compelling state interests: (1) depriving criminals convicted of felonies of the profits

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[7] As discussed above, restitution is consistent with California's compelling state interest expressed in the California Constitution. Placing any money unclaimed by a victim-beneficiary into the Restitution Fund simply is consistent with two of California's compelling state interests: depriving convicted felons of the profits of crimes that have proximately caused physical, mental, or emotional injury, or pecuniary loss to the victims, and restitution for victims who have suffered losses. For Restitution Fund purposes, a "victim" is a person who has sustained "injury or death as a direct result of the crime," Cal. Gov. Code § 13960(a)(1), and an "injury" includes "physical or emotional injury, or both," Cal. Gov. Code § 13960(b).

of their crimes which proximately cause physical, mental, or emotional injury, or pecuniary loss to the victims; (2) compensating victims who sustained injuries from the crimes for which the felon was convicted, and (3) providing restitution for all victims.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: June 28, 2002

Respectfully submitted,

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